U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-S-D-, INC.

DATE: APR. 18, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which describes itself as a merchandise and contract manufacturer, seeks to permanently employ the Beneficiary in the United States as a marketing manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on December 15, 2014. The Director determined that the Petitioner had not established that the Beneficiary was qualified for the offered position. Specifically, the Director determined that the Beneficiary did not have a degree in a field of study required for the offered position. The Director also cited discrepancies between the Petitioner's evidence and information gained through a U.S. Citizenship and Immigration Services (USCIS) site visit.

The matter is now before us on appeal. The Petitioner challenges the validity of the information obtained during the site visit and claims that the Director exaggerated the significance of the noted discrepancies. The Petitioner also asserts that the Director misinterpreted the minimum education as stated on the labor certification. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is October 31, 2013.[2]

The Petitioner previously filed a non-immigrant petition to sponsor the Beneficiary's temporary employment. On November 18, 2009, USCIS officers performed a site visit at the Petitioner's place of business in connection with the non-immigrant petition. The officers noted that during the site

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

visit the company president was not present so they spoke with the company's Procurement and Logistics Director, indicated that he had limited knowledge of the petition, but confirmed that the Beneficiary had worked for the Petitioner as an office manager or product development manager for approximately one year. After speaking with the officers concluded that the Beneficiary was working for the Petitioner as a product development analyst.

The Director issued a notice of intent to deny (NOID) for the instant petition on October 30, 2014. In his NOID, the Director stated that the Beneficiary did not possess a degree in one of the required fields of study and offered the Petitioner an opportunity to submit evidence that it had advertised to potential job candidates that "any baccalaureate degree with five years progressive experience in business administration or marketing was an acceptable education substitute for a Master's Degree in Business Management or Marketing."

In the NOID, the Director also informed the Petitioner of details of the site visit that had been conducted in 2009. The Director pointed out that statement in 2009 that the Beneficiary had worked for the Petitioner for approximately one year, contradicted the Beneficiary's claim on the labor certification to have worked for the Petitioner since October 1, 2006. The Director offered the Petitioner an opportunity to submit evidence demonstrating that the Petitioner continuously employed the Beneficiary since October 1, 2006.

The Petitioner responded to the NOID on November 26, 2014, and submitted a November 11, 2014, statement from in which he clarified the statements he made during the site visit. explained that he was not fully aware of the details of the Beneficiary's employment there because he was the inventory, logistic, and warehouse manager for the Petitioner, not the managing director. denied that he had told USCIS officers that the Beneficiary had "been with the company for about one year" and stated that "[a]t that time I knew [the Beneficiary] for more than 5 years on a personal level."

The Director determined that the Petitioner had not established that the Beneficiary satisfied the educational requirements for the offered position, as the Beneficiary's degree was not in business administration or marketing as required by the labor certification. The Director also noted that the file "contains some inconsistencies that were not resolved." Specifically, the Director cited the following discrepancies:

- All of the pay statements submitted by the Petitioner for January through December of 2013 reflect identical YTD gross earnings of $42,955.05.
- During the site visit "didn't appear to know the beneficiary very well…in his affidavit, indicated that at the time of his interview he had known the beneficiary longer than 5 years."

The Director concluded that the Petitioner had not overcome the noted discrepancies and denied the Petition.

II. LAW AND ANALYSIS

A United States employer may sponsor a foreign national for lawful permanent residence, which is a three part process. First, the U.S. employer must obtain a labor certification, which the DOL processes. *See* 20 C.F.R. § 656, *et seq.* The labor certification states the position's job duties and the position's education, experience and other special requirements along with the required proffered wage and work location(s). The beneficiary states and attests to his or her education and experience. DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act. DOL's certification affirms that, "there are not sufficient [U.S.] workers who are able, willing, qualified" to perform the position offered where the beneficiary will be employed, and that employment of such beneficiary will not "adversely affect the wages and working conditions of workers in the United States similarly employed." *See* INA § 212(a)(5)(A)(i).

Following labor certification approval, a petitioner files Form I-140, Immigrant Petition for Alien Worker, with USCIS within the required 180 day labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8 C.F.R. § 204.5. USCIS then examines whether: the petitioner can establish its ability to pay the proffered wage, the petition meets the requirements for the requested classification, and the beneficiary has the required education, training, and experience for the position offered. *See* INA § 203(b)(3)(A)(ii); 8 C.F.R. § 204.5.[3]

As noted above, the I-140 petition in this case is accompanied by a labor certification, approved by DOL, and with a priority date of October 31, 2013.

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

[3] In the final step, the beneficiary would file an I-485, Application to Adjust Status or Register Permanent Residence, either concurrently with the I-140 petition based on a current priority date, or following approval of an I-140 petition and a current priority date. *See* 8 C.F.R. § 245.

> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

None of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the beneficiary are qualified for a specific immigrant classification. *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In evaluating a beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

B. The Beneficiary's Educational Qualifications

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4.	Education: Master's degree.
H.4-B.	Major field of study: Business Administration or Marketing.
H.5.	Training: None required.
H.6.	Experience in the job offered: None required.
H.7.	Alternate field of study: None accepted.
H.8.	Alternate combination of education and experience: Bachelor's degree plus five years of experience.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: None accepted.
H.14.	Specific skills or other requirements: Master of Business Administration or

> Marketing or its equivalent based on any suitable combination of education, training, experience determined by a qualified evaluation service required.

Part J of the labor certification states that the Beneficiary possesses a Bachelor of Arts degree in international affairs from [redacted] Florida, completed in 2005. The record contains a copy of the Beneficiary's diploma and transcripts from [redacted], issued in 2005.

In the instant case, the labor certification states that the offered position requires a bachelor's degree in business administration or marketing, plus five years of experience in the offered position of marketing manager. The Petitioner asserts that the regulations "do not require that the bachelor's degree must be in a specific field." However, the labor certification must represent the employer's actual minimum requirements for the job opportunity. 20 C.F.R. § 656.17(i)(1). If the Petitioner had intended to accept a degree in a field of study other than business administration or marketing it could have indicated so at Line H.7 of the labor certification. The Petitioner indicated at Line H.7 that no other field of study would be accepted.

In response to the Director's notice of intent to dismiss, the Petitioner submitted copies of online and print advertisements for the offered position. The advertisements identify only two acceptable fields of study, including marketing and business administration. The record does not show that potentially qualified applicants were put on notice that degrees in other fields of study would be considered.

The Petitioner has not established that the Beneficiary possesses the minimum education required for the offered position, as set forth on the labor certification. We will therefore affirm the Director's decision and dismiss the appeal.

C. The Beneficiary's Experience Qualifications

Part K of the labor certification states that the Beneficiary possesses the following employment experience:

- Employment as a product development assistant for [redacted] Bulgaria, from June 20, 1997, until April 23, 1999;
- Employment as a product development analyst for the Petitioner from October 1, 2006, through December 31, 2009; and,
- Employment as a senior product development analyst for the Petitioner since January 1, 2010.

The record contains an experience letter from the director of product development at [redacted] confirming the Beneficiary's employment there from June 20, 1997, through April 23, 1999. The record also contains an April 18, 2013, experience letter from the president and owner of the Petitioner, affirming the Beneficiary's work there as a product development analyst from October 1, 2006, through December 31, 2009, and as a senior product development analyst since January 1, 2010.

As noted above the labor certification requires five years of experience in combination with a bachelor's degree. The record documents that the Beneficiary possesses 22 months of experience based on his employment with While the Beneficiary claims on the labor certification an additional seven years and 11 months of experience with the Petitioner, the record includes inconsistencies in the dates of the Beneficiary's actual employment.

The record includes three sets of pay stubs reflecting payments the Petitioner made to the Beneficiary for the same period of time. Each paystub in the first set[4] reflects a hire date of January 22, 2007. Each paystub in the second set[5] reflects a hire date of October 1, 2006. The pay statements in the third set[6] are in a format that is notably different than the two other sets and they do not reflect the Beneficiary's hire date. The discrepancy in the Beneficiary's hire date, as listed on two different sets of paystubs for the same period, casts doubt on the Beneficiary's actual dates of employment with the Petitioner.[7]

The Director noted that the paystubs in the third set all reflect the same year-to-date wages of $42,955.05. The record includes a letter from , operations supervisor for the company that processed the Petitioner's payroll since 1997. explained that the third set of paystubs was generated through a payroll report, and that their software will display the same year-to-date earnings on each paystub when a report is generated after the pay check was actually issued. This letter explains the different format, as well as the listing of the same year-to-date wages on all paystubs. However, we note that the Beneficiary's final pay statement in this third set (check dated December 20, 2013) reflects year-to-date gross wages of $42,955.05, while the Beneficiary's IRS Form W-2 reflects that he was paid $42,792.03 in 2013. Neither the Petitioner nor the third party payroll supervisor has explained why the pay statement for December 20, 2013, reflects wages higher than those reported for all of 2013.

Further, neither the Petitioner nor the third party payroll supervisor has explained why two different sets of paystubs were issued contemporaneously, or why the paystubs reflect different a hire dates. It is the Petitioner's burden to establish eligibility for the benefit sought. Section 291 of the Act; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile

[4] The Petitioner submitted the first set in response to the Director's October 23, 2013, request for evidence relating to another petition it filed for this Beneficiary

[5] The Petitioner submitted the second set in response to the Director's October 30, 2014, NOID.

[6] The Petitioner submitted the third set in response to the Director's February 4, 2015, NOID relating to another petition it filed for this Beneficiary .

[7] On January 12, 2012, the Petitioner filed a Form I-140 petition on behalf of this Beneficiary under receipt This petition was accompanied by a labor certification stating that the Beneficiary worked for the Petitioner from January 1, 2006, until January 14, 2007. The labor certification supporting the instant petition claims that the Beneficiary has worked there since October 1, 2006. Although the Petitioner has suggested that the dates of employment on the earlier labor certification were typographical errors, the hire date of January 22, 2007, listed on the paystubs remains unexplained.

such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In this case, because the Petitioner has not explained the discrepancies in the hire dates listed on the sets of paystubs, we cannot determine whether the Beneficiary was continuously employed with the Petitioner since October 1, 2006, and whether the Beneficiary has the required five years of experience.

Therefore, we conclude that the Petitioner has not established that the Beneficiary possesses the minimum experience required for the offered position, as set forth on the labor certification.

After reviewing all of the evidence in the record, we conclude that the Petitioner did not establish that the Beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act. Accordingly, the petition must be denied for this reason.

D. Inconsistencies in the Record

In his decision, the Director stated that the "file still contains some inconsistencies that were not resolved." The Director cited discrepancies between statements from made in 2009, and statements from in 2014. The Director stated that in his 2009 statement "didn't appear to know the beneficiary very well" while he stated in 2014 that he "had known the beneficiary longer than 5 years. This suggests they were friends prior to the beneficiary's employment with the petitioner." However, the statements cited by the Director do not directly contradict each other and the Director has not established the relevance of the depth of the friendship between the Beneficiary and We will withdraw this portion of the Director's decision.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of F-S-D-, Inc.*, ID# 15880 (AAO Apr. 18, 2016)